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In the

# Supreme Court of the United States

OCTOBER TERM, 1967

PAUL V. BYRNE, JR.,

*Petitioner,*

*vs.*

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

PAUL V. BYRNE, JR.,
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Petitioner

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT**

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PAUL V. BYRNE, JR., petitions this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit on the following grounds:

1. (a) There were no opinions, reported or unreported, official or unofficial, of the Courts below in this case. A copy of the judgments rendered in the Courts below is submitted on pp. 4 and 5 below.

(b) Jurisdiction of this Court is invoked under the statutory provisions of Title 28 USCA §§ 1254(1), 2101 (c) and is addressed to the Court's sound judicial discretion in exercising its supervisory power where the court of appeals has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings; has decided an important federal question in a way in conflict with applicable decisions of this Court, and has decided in conflict with the decisions in other circuits.

The time factor of this Court's jurisdiction rests on the Seventh Circuit Court of Appeals decision rendered on June 8, 1967, (A. 37), denying petitioner's motion to reconsider the dismissal of the appeal rendered on April 13, 1967, (A. 35), and also denying respondents' motion to strike petitioner's motion, and an extension of the time for filing this petition to October 6, 1967 granted by Justice Black on August 30, 1967.

(c) The questions here presented for review are:

I. Can a State classify persons, without consent, as subjects for experimental research to benefit society without adhering to precise standards of classification required by the Fourteenth Amendment?

II. In taking a person's property and liberty, how far can State action go in pursuit of a valid State interest before tolling the individual's Constitutional defenses?

III. Is petitioner, under the admitted facts in this case, entitled to be heard fairly and impartially on the merits of his claim in a federal court without regard to his financial status?

IV. Is this Court's interpretation and construction of an Act of Congress, binding on the lower federal courts and do the records of a federal court import absolute verity?

(d) The following federal constitutional and statutory provisions are involved in the facts of this case: (i) Amendments 1, 4, 5, 6, 8, and 14 to the Constitution of the United States, Title Amendments 1-5 USCA, p. 4, 5, 6 (1961 ed.), (A. 38); Statutes of the United States:

Title 7 USCA § 2131, p. 137 (supp.) 1964 ed. (A. 39)
Title 28 USCA § 453, p. 465 (1949 ed) (A. 39)
Title 28 USCA § 1343, p. 202 (1962 ed) (A. 39)
Title 28 USCA § 1654, p. 13 (1966 ed) (A. 40)
Title 42 USCA § 1983, p. 98 (1964 ed) (A. 40)
Title 42 USCA § 1985, p. 226 (1964 ed) (A. 40)

(iii) Illinois Statutes involved are:

A. (Petition to abandon cemetery lot) ch. 21 §21.3, Ill. Rev. Stat. (1963) vol. 1, p. 474 (State Bar Assn. ed).

B. (Application for license) ch. 16½ § 34(d) Ill. Rev. Stat. (1963) vol. 1, p. 330 (State Bar Assn. ed).

C. (Jurisdiction of County Court) ch. 91½ § 2-2 Ill. Rev. Stat. (1963) vol. 2, p. 823 (State Bar Assn. ed).

D. (Authority of Superintendent) ch. 91½ § 6-3 Ill. Rev. Stat. (1963) vol. 2, p. 829 (State Bar Assn. ed).

E. (Psychiatric or psychological counseling or sociological training) ch. 108 § 122 Ill. Rev. Stat. (1963) vol. 2, p. 1240 (State Bar Assn. ed).

## STATEMENT OF THE CASE

This petition is before the Court on the complaint and motions to dismiss for failure to state a claim.

The Honorable James Parsons of the District Court for the Northern District of Illinois, Eastern Division gave petitioner leave to commence this suit in forma pauperis on July 27, 1966 (R. 3).

The case was regularly assigned to the Honorable Bernard Decker who was then on vacation during the Court's summer recess. Jurisdiction of the Court was invoked under the provisions of Title 42 USCA §§ 1983, 1985 and Title 42 USCA § 1343 (R. 5, 6, 219).

On September 14, 1966 upon Judge Decker's resumption of the bench at a hearing on petitioner's motion to obtain discovery, petitioner was informed that the complaint had already been dismissed from the chambers of the Honorable Joseph Perry on September 9, 1966, (R. 253). Judge Perry, while sitting as emergency recess judge on August 17, 1966, had taken the case "under advisement" on motion of eleven of the respondents (R. 378).

Judge Perry's order dismissing the complaint which reads:

> "ORDER: Each and every defendant has moved to dismiss the complaint herein and has set forth the grounds therefor and each has adopted all of the grounds claimed by all the others. Briefs of the parties have been filed and the court, having considered the complaint and the motions to dismiss, finds each of the motions well taken.
>
> It is therefore ORDERED that the motions of the defendants and each of them be and they hereby are granted and the complaint is dismissed as to each and every defendant named therein for the various reasons set forth in said motions." (R. 253; A. 32).

is based on false affidavits of service (R. 256, 257, 259, 260) and was rendered without hearing or argument on any of the motions before the court.

Petitioner's attempts on July 19, 1966 to have Judge Decker vacate Judge Perry's dismissal (R. 272); to strike the false affidavits of service (R. 278); and for leave to amend the complaint were denied by Judge Decker serially, on September 19, 23, and 28, 1966. (R. 391, 418)

Petitioner's appeal from the orders of the District Court were dismissed by the Court of Appeals without hearing or argument on April 17, 1967 stating: (In relevant part)

> "On further consideration of the several motions of defendants-appellees to dismiss this appeal, the answer of plaintiff-appellant thereto, the brief and appendix filed herein by plaintiff-appellant;
> It Is Ordered by the Court, that this appeal be and the same is hereby dismissed for the reason that plaintiff-appellant's complaint does not state a claim upon which relief can be granted under the Civil Rights Statutes, 42 U.S.C.A. §§ 1983 and 1985, and on the further authority of a prior decision of this Court as reported in *Byrne* v. *Kysar,* 7 cir., 347 F.2d 734 (1965)." (A. 35);

and on June 8, 1967 the Court of Appeals denied petitioner's motion to reconsider the dismissal of the appeal (A. 37) without determination of petitioner's request for leave to proceed in forma pauperis (A. 1-31).

The federal questions raised by petitioner's complaint were detailed in State Court proceedings before the Courts below, (R. 17 to 69, A. 1 to 31) which showed that between 1962 and 1965 the respondents, acting in concert under color of Illinois law, succeeded in accomplishing the devastation of petitioner's estate (then ap-

proximating $50,000.00) and his person by having petitioner arrested, jailed, stripped of his home, family, inheritance and good repute.

The blending of civil and criminal State Court proceedings commenced with a civil suit initiated by respondents Chicago Title and Trust Company and Robert V. Hogan on September 20, 1962 to force petitioner out of his home (R. 17, 18; A. 17). Next, petitioner was arrested, jailed, fingerprinted and released on bond on December 20, 1962 (R. 21, A. 18) on fictitious charges by respondents (R. 19, A. 18) that were dropped on January 24, 1963 (R. 19, A. 18).

The merry-go-round, in the meantime, turned to a "civil" proceeding on January 9, 1963 when petitioner was arrested on a document labeled "petition" (R. 43, A. 27) at his place of employment as he was about to commence work at 8 p.m. and placed in the custody of respondent URSE (R. 43) who for 10 consecutive days next ensuing held petitioner incommunicado, without access to telephone or United States mail, and kept him forcibly drugged each day (R. 22, 23, A. 19). During a short interlude on the seventh day of petitioner's incarceration (January 16, 1963) the respondents Schlax, MacKinnon and Adesko conducted a proceedings (R. 24-41, A. 19-26) denominated "judicial" and "civil" in a small chamber provided by respondent URSE far removed from any court house to which petitioner was brought semi-comatose.

The brief inquisitorial proceedings, unburdened by any fact finding process, show the purported appearance of respondent MacKinnon (whom petitioner has yet to meet), as "attorney for defendant" (R. 42, A. 26) as well as a novel notion of advocacy (R. 24-41, A. 19-26).

Pursuant to the orders entered by respondents, petitioner was punished by commitment to close confinement and the threat of forced psycho-surgery for the welfare of the public, until April 15, 1963 (R. 13, R. 11, A. 9).

The remnants of petitioner's estate including a $24,000.90 inheritance over which respondent First National Bank took control on April 20, 1964, in a fiduciary capacity (R. 14, 15, A. 12, 13), were readily gathered and sequestered by the various respondents participating in concert in subsequent civil proceedings (R. 44-69, A. 29-31) between June 1963 and October 1965.

The judicial jurisdiction upon which the respondents based their authority to pick petitioner clean of his property is founded on a decree (R. 65, 66) entered in ex parte proceedings (R. 47-60) conducted without notice to petitioner or according to law. (R. 13)

## ARGUMENT

### I.

### CAN A STATE CLASSIFY PERSONS, WITHOUT CONSENT, AS SUBJECTS FOR EXPERIMENTAL RESEARCH TO BENEFIT SOCIETY WITHOUT ADHERING TO THE PRECISE STANDARDS OF CLASSIFICATION REQUIRED BY THE FOURTEENTH AMENDMENT?

The State Court records before the Courts below in this case, together with the applicable provisions of Illinois law and usages, show that petitioner, along with more than 4,000 human derelicts annually from one Illinois county alone (Annual report, Circuit Court of Cook County, 1964, p. 9), was adjudicated a candidate for experi-

mental research honors, as an unconsenting subject, to benefit the public.

While Illinois has seen fit to abolish by legislative fiat a human guinea pig's right to consent, or refusal to consent (Ill. Rev. Stat., ch. 91½ § 6-3, 1963, A. ) nowhere has she imposed any standards on the bizarre and exotic surgeries, brain implants, leucotomies (Projects 1705, 1707, 1730, The First Five Years, 1957-1962, Illinois Psychiatric Training and Research Authority) to which any person "found" in Illinois may be subjected, any more than she has established any precise standards for the classification, selection, and adjudication of persons including petitioner as experimental material under coercion.

While Illinois places the same disabilities and stigma on persons once committed to her "mental" institutions that she places on those committed to penal institutions (Ill. Rev. Stat., ch. 16½ § 34(d), 1963), at the same time she refuses to let those who have been committed to her penitentiaries be subjected to "treatment" of "shock", or "surgery" without their consent (Ill. Rev. Stat., ch. 108 § 122, 1963, A. 41) either as punishment, treatment, or to benefit society.

At the very least the Equal Protection Clause of the Fourteenth Amendment demands that petitioner along with the thousands of assorted paupers, vagrants, senile delinquents, who are processed annually under the Illinois Mental Health Code (Ill. Rev. Stat., ch. 91½ 1963) be classified according to some rational, precise standards before being stripped of liberty, property and even life itself, because of asserted non-conforming behavior.

The glossary of labels which Illinois has used to classify persons as "lunatic", "idiot", "insane", "demented", "men-

tally ill", "in need of mental treatment", and others does not provide a standard of distinction or classification with any medical or scientific precision much less legal significance.

Nor can unexplained medical labels (*Carter* v. *United States,* (CA DC) 252 F 2d 608, 617), nor medical syndrome labels (Becker, Ph. D, Revolution in Psychiatry, New York, 1964, p 6), nor a mental-medical mumbo-jumbo (Smith, Ph. D., 20 Journal American Psychological Association 911, November 1965) which have erected a Tower of Babel in the otherwise precise science of medicine (Weiner, M.D., in Schizophrenia (Bellak, M.D., ed) New York, 1958 p 110; Editorial, 9 Canadian Psychiatric Association Journal 367, 1964; Pleune, M.D., 46 International Journal of Psychoanalysis 358, 1965; Editorial, xviii American Journal of Psychotherapy 186, 1964; Bromberg, M.D., The Mind of Man, New York, 1959, pp 264-270; Rosenwald, Ph. D., Psychiatry, 1963, pp. 233-240) supplant words whose meaning has deep roots in the precise science of law. *Jordan* v. *DeGeorge,* 341 US 223, 227, 95 L ed. 886, 890, 71 S Ct 703.

A grabbag of phrases without any roots in the law: "psychopathic personality" (*Boutilier* v. *Immigration Service,* 387 US 118, 18 L ed 2d 661, 666, 87 S Ct 1563), "Mongrel breed" (*Loving* v. *Virginia,* US , 18 L ed 2d 1010, 1015, 87 S Ct 1817), "schizophrenic", "dementia praecox", "low-grade moron" (*Galloway* v. *United States,* 319 US 372, 386, 63 S Ct 1077, 1085, 87 L ed 1458), "moral pestilence" (*Edwards* v. *California,* 314 US 160, 176, 86 L ed 119, 62 S Ct 164, 168), "chronic addict" (*Robinson* v. *California,* 370 US 660, 665, 8 L ed 2d 758, 762, 82 S Ct 1417), or "delinquent" (Re Gault,

387 US 1, 18 L ed 2d 527, 87 S Ct 1528), if they are "legal terms of art" (*Boutilier* v. *Immigration Service,* (CA 2) 363 F 2d 488, 493) they have no scientific or medical value (Karl Menninger, M.D., Saturday Evening Post, April 25, 1964, p 12; Szasz, M.D., Law, Liberty and Psychiatry, New York, 1963; Blaustein, M.D., in Schizophrenia (Bellak, M.D., ed), New York, 1958; Kiev, M.D., 9 Canadian Psychiatric Association Journal 114, 1964; Norman, Ph. D., 27 Journal Consulting Psychology 40, 1963) and do not satisfy the criteria necessary to overcome the 14th Amendment's proscription against irrational, invidious or arbitrary classifications and distinctions when State action invades basic personal rights. *Skinner* v. *Oklahoma,* 316 US 535, 86 L ed 1655, 62 S Ct 1110; *Edwards* v. *California,* 314 US 160, 86 L ed 119, 62 S Ct 164; *Robinson* v. *California,* 370 US 660, 8 L ed 2d 758, 82 S Ct 1417.

The "void for vagueness" doctrine, where state action strips a person of his rights, is applicable to civil as well as criminal actions. *Small Co.,* v. *Am. Sugar Ref. Co.,* 267 US 233, 239; 69 L ed 589, 592, 45 S Ct 295; *Boutilier* v. *Immigration Service,* 387 US 118, 18 L ed 2d 661, 666, 87 S Ct 1563.

At one time in Illinois horses (as property) were entitled to a more realistic verification of their asserted disease (*Pearson* v. *Zehr,* 29 NE 854, 138 Ill. 48, 32 Am St Rep 113, 1891) than are human beings today; and State officials were held liable in exemplary damages to the de-horsed owner without reference to the Fourteenth Amendment or Civil Rights legislation.

## II.

## IN TAKING A PERSON'S PROPERTY AND LIBERTY, HOW FAR CAN STATE ACTION GO IN PURSUIT OF A VALID STATE INTEREST BEFORE TOLLING THE INDIVIDUAL'S CONSTITUTIONAL DEFENSES UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

The State Court proceedings before the Courts below in this case which relieved petitioner of his property, liberty and domain over his body were denominated "civil" proceedings and were conducted by a tribunal which proceeded contrary to the express statutory authority creating its jurisdiction and without its authority having been properly invoked. The accused (petitioner) had no counsel, before or during the proceedings; nor any intelligent waiver. There was no evidence, documentary, testimonial or demonstrative adduced in the proceedings; nor confrontation of any witnesses. No fact-finding process, inquisitorial, accusatorial or divine was invoked and none of the incidents, procedural or substantive, of a fair trial appear. (R. 22-43, A. 19-26).

As the complaint alleged (R11, A9, 10) and as respondents have admitted as true in their motions to dismiss, Illinois law (Ill. Rev. Stat., ch 91½, § 2-2) gave the respondent Adesko no judicial jurisdiction over the subject matter of petitioner's mental condition while petitioner was then in the custody and under the jurisdiction of another court charged with a criminal offense (R. 19, 21; A. 17, 18).

Nor could the respondents, had they been otherwise clothed with jurisdiction, have proceeded against petitioner on the allegations of the document labeled "Peti-

tion for Commitment" (R. 43, A. 27) which are inadequate to give an Illinois court jurisdiction over an abandoned cemetery lot (Ill. Rev. Stat., ch 21 § 21.3, 1963).

Regardless of whether a governmental process be denominated "civil" or "criminal", where the personal domain is invaded the Constitution describes an individual's perimeter of defense. *Boyd* v. *United States,* 116 US 616, 29 L. ed 746, 6 S Ct 524; Ex Parte Young, 209 US 123, 156, 52 L ed 714, 727, 28 S Ct 441; *One Plymouth Sedan* v. *Pennsylvania,* 380 US 693, 696, 14 L ed 2d 170, 172, 85 S Ct 1246; *Carroll* v. *United States,* 267 US 132, 147, 69 L ed 543, 549, 45 S Ct 280; *Mapp* v. *Ohio,* 367 US 643, 656, 6 L ed 2d 1081, 1090, 81 S Ct 1684, 84 ALR 2d 933.

And the mere label "civil" or "criminal" action does not delimit the procedural safeguards to which a person is entitled. *Smith* v. *Bennett,* 365 US 708, 6 L ed 2d 39, 81 S Ct 895; *People* v. *Olmstead,* 32 Ill. 2d 306, 205 NE 2d 625; *Klapprott* v. *United States,* 335 US 601, 616-619, 69 S Ct 384, 391-392, 93 L ed 1280.

But irrespective of whether the governmental process against a person is invoked under benevolent auspices (*Kent* v. *United States,* 383 US 541, 16 L ed 2d 84, 86 S Ct 1045) *Robinson* v. *California,* 370 US 660, 8 L ed 2d 758, 82 S Ct 1417 a State is required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties are at stake. *Katzenbach* v. *Morgan,* 384 US 641, 654 note 15, 16 L ed 2d 828, 838, 86 S Ct 1717; *Carrington* v. *Rash,* 380 US 89, 96, 13 L ed 2d 675, 680, 85 S Ct 775; *Harper* v. *Virginia Board*

*of Elections,* 383 US 663, 670, 16 L ed 2d 169, 175, 86 S Ct 1079; *Thomas* v. *Collins,* 323 US 516, 529-530, 89 L ed 430, 439, 440, 65 S Ct 315; *Thornhill* v. *Alabama,* 310 US 88, 95-96, 84 L ed 1093, 1098, 60 S Ct 736; *United States* v. *Carolene Products Co.,* 304 US 144, 152-153, note 4, 82 L ed 1234, 1241-1242, 58 S Ct 778; *Meyer* v. *Nebraska,* 262 US 390, 67 L ed 1042, 43 S Ct 625, 29 ALR 1446.

Under the 14th Amendment guarantees of personal liberty it is the accusatorial rather than the inquisitorial process that sets out the first pickets of defense against state action. *Griffin* v *California,* 380 US 609, 616, 14 L ed 2d 106, 110, 85 S Ct 1229; Re Groban, 352 US 330, 351-353 (Warren, C.J., Black, Douglas, Brennan, J.J., dissenting opinion), 1 L ed 2d 376, 77 S Ct 510, 523; Re Oliver, 333 US 257, 273, 68 S Ct 499, 507, 92 L ed 682; *Watts* v. *Indiana,* 338 US 49, 54, 69 S Ct 1347, 1350, 93 L ed 1801; *Reck* v. *Pate,* 367 US 433, 446-448, 6 L ed 2d 948, 957-958, 81 S Ct 1541.

In addition to a regularly constituted tribunal, its jurisdiction properly invoked (*Galpin* v. *Page,* (US) 18 Wall 350, 21 L ed 959); *Kenney* v. *Greer,* 13 Ill. 432; *Mamer* v. *Morrison,* 35 Ill. 2d 133, 219 NE 2d 524), the accusatorial process includes such rudimentary elements of defense as trial, immunity against self-incrimination, confrontation of accusers and right to counsel (*Kent* v. *United States,* 383 US 541, 555, 16 L ed 2d 84, 94, 86 S Ct 1045 *Re Gault,* 387 US 1, 18 L ed 2d 527, 87 S Ct 1528) as well as the venerable requirements of notice (*Armstrong* v. *Manzo,* 380 US 545, 549, 14 L ed 2d 62, 65, 85 S Ct 1187, *Eddy* v. *The People,* 15 Ill. 386 *Re Gault,* 387 US 1, 18 L ed 2d 527, 87 S Ct 1528) before State judicial action can have validity.

The doctrine of parens patriae, subsumed from murky Civil Law antecedents without "constitutional domestication" (*Re Gault,* 387 US 1, 18 L ed 2d 527, 540, 87 S Ct 1528; *Kent* v. *United States,* 383 US 541, 16 L ed 2d 84, 86, 86 S Ct 1045) is not a fair substitute for a due fact-finding process in discovering the truth under the adversary system; and the infirmities of a State "trial" absent constitutional guarantees are not cured by the rhetorical euphemisms, "treatment", (for punishment) or "receiving home" (for incarcerating institution) or the label "Clinical" attached to the proceedings. *Re Gault,* 18 L ed 2d at 539; Goffman, Asylums, New York, 1961 p 369.

As long as a due process trial requires some evidence (*Thompson* v. *Louisville,* 362 US 199, 4 L ed 2d, 654, 80 S Ct 624, 80 ALR 2d 1355) and medical inference testimony is not evidence (*Galloway* v. *United States,* 319 US 372, 386, 63 S Ct 1077, 1085, 87 L ed 1458) without probing the basis of experts' conclusions (*Rollerson* v. *United States,* (CA DC) 343 F 2d 269, 272) then the precise and discriminating exactions of due process (*Schlagenhauf* v. *Holder,* 379 US 104, 127, 13 L ed 2d 152, 169; 85 S Ct 234) are not met by substituting "clinical" shotgun procedures (Smith, Ph. D., 20 Journal American Psychological Association 911, November 1965) which have no scientific reliability or validity. Taft and England, Criminology, 4th ed, New York, 1964, p 309 48 Ia. L Rev 59, 1962, Liefer, 19 American Psychologist 825, 1964.

If Congress has seen fit to restrain, under penalty, the excesses of scientific research on the Nation's dogs and cats (Title 7 USCA §§ 2131 ff., PL 89-544, 80 Stat 350) along with monkeys guinea pigs, hamsters and rabbits (Sen Rep No. 1281, 89th Cong 2nd Sess, U S

Code and Ad News, p 2635), the Federal Courts in our era of enlightment should correct a state court's deficient fact-finding process where federal human rights are infringed. *Townsend* v. *Sain,* 372 US 293, 9 L ed 2d 770, 83 S Ct 745; *Greenwood* v. *Peacock,* 384 US 808, 829, 16 L ed 2d 944, 958, 86 S Ct 1800.

## III.

## IS PETITIONER, UNDER THE ADMITTED FACTS IN THIS CASE, ENTITLED TO BE HEARD FAIRLY AND IMPARTIALLY ON THE MERITS OF HIS CLAIM IN A FEDERAL COURT WITHOUT REGARD TO HIS FINANCIAL STATUS?

The only hearing which the District Court granted on the merits of the claim in this case was briefly entertained on September, 19, 1966, (R391-393), when Judge Decker to whom the case had been regularly assigned on July 27, 1966, denied petitioner's motion (R276) to vacate the order of Judge Perry dismissing the complaint (R 273) entered from chambers without hearing or argument on September 9, 1966 after taking the case as recess judge on motion of several of the respondents made on August 17, 1966. (R366-378).

A judgment on the merits rendered by a federal District Court from chambers without hearing and without argument on the merits of a constitutional claim is in derogation of the power and authority of the Court to impartially hear and determine the cause (*Overby* v. *Gordon,* 177 US 214, 44 L ed 741, 20 S Ct 603; *Re Reed,* 100 US 13, 25 L ed 538; *Simmons* v. *Saul,* 138 US 439, 34 L ed 1054, 11 S Ct 369); and a Court's decision rendered without hearing is a mere arbiting edict (*Windsor* v. *McVeigh,* 93 US 274, 23 L ed 914) where a Federal

judge's oath (Title 28 USCA § 453) and office requires that constitutionally protected rights be given judicial protection, if binding on judges of the Supreme Court (*Reynolds* v. *Sims,* 377 US 533, 566, 12 L ed 2d 506, 530, 84 S Ct 1362) binds District judges as well.

The opportunity, as a matter of right in the Federal Courts (Title 28 USCA § 1654), to be heard fairly and impartially is denied when a litigant is faced in his first appearance for hearing and argument before one judge with the task of overcoming an adverse decision previously entered by another judge without hearing or argument. *Armstrong* v. *Manzo,* 380 US 545, 551, 14 L ed 2d 62, 66, 85 S Ct 1187.

When the outcome is decided by imposing an inequitable burden of proof (*Speiser* v. *Randall,* 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332) where the opportunity to be heard is a fundamental requirement of due process (*Grannis* v. *Ordean,* 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779) the right could have been accorded by granting a motion to vacate and consider the case anew *Armstrong* v. *Manzo,* 380 US 545 at 553, 14 L ed 2d 62 at 66.

A civil action in the Federal Courts, provided for by Congress (Title 28 USCA § 1343, Title 42 USCA §§ 1983, 1985) is an appropriate method to enforce Federal rights against state action either by vindicating injury to person and property (*Monroe* v. *Pape,* 365 US 167, 5 L ed 2d 492, 81 S Ct 473; *Greenwood* v. *Peacock,* 384 US 808, 829, 16 L ed 2d 944, 958, 86 S Ct 1800) or by inhibiting threats to constitutional guarantees (*Dombrowski* v. *Pfister,* 380 US 479, 14 L ed 2d 22, 85 S Ct 1116) for what the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary nor all

three in concert may strip away (*Nishikawa* v. *Dulles*, 356 US 129, 138 (concurring opinion), 2 L ed 2d 659, 666, 78 S Ct 612) any more than state governments—and every branch of them, executive, legislative and judicial —where any individual, however, lowly and unfortunate, asserts a legal claim (*Caritativo* v. *California*, 357 US 549, 558 (Frankfurter, Douglas, Brennan, JJ, dissenting opinion), 2 L ed 2d 1531, 1538, 78 S Ct 1263).

## IV.

## IS THIS COURT'S INTERPRETATION AND CONSTRUCTION OF AN ACT OF CONGRESS BINDING ON THE LOWER FEDERAL COURTS, AND DO THE RECORDS OF A FEDERAL COURT IMPORT ABSOLUTE VERITY?

(a)

The Court of Appeals in dismissing the appeal in this case cited as authority its prior holding in a case decided in June, 1965. (A. 42). The complaint in this case was filed in July, 1966 following a unanimous decision of this Court in March, 1966, (*United States* v. *Price*, 383 US 787, 16 L ed 2d 267, 86 S Ct 1152) which construed the phrase "under color of law" as used by Congress in the pertinent statute in a manner contrary to that relied on by the Court of Appeals in its prior Holding (*Byrne* v. *Kysar*, (CA7) 347 F 2d 734, June 1965).

While petitioner believes that this Court's holding in a recent case where the Court of Appeals judgment sustaining the District Court's dismissal for failure to state a claim under § 1983 was reversed by this Court to conform with the decisions in the other circuits there cited (*Cooper* v. *Pate*, 378 US 546, 12 L ed 2d 1030, 84 S Ct 1733 (1964) could be dispositive of the issues raised in this petition—and despite the respondents' technical

objections raised against the inartificiality of the complaint (*Radovich* v. *National Football League,* 352 US 445, 453, 1 L ed 2d 456, 462, 77 S Ct 390)—petitioner treats the issues as they are presented by the complaint and taken as true, as they must be, on motions to dismiss.

Against the contentions of respondents and as noted by the Court below (A. 36) that *Byrne* v. *Kysar,* 347 F2d 734, 7 cir (1965) is authority for the dismissal of the complaint here, petitioner relies on this Court's plain exposition of the conditions under which a prior decision can operate as a bar to another suit in the same or related cause. (*Costello* v. *United States,* 365 US 265, 286, 5 L ed 2d 551, 565, 81 S Ct 534). And where (as in *Byrne* v. *Kysar,* 347 F2d 734, 7 cir, appendix to record p 39) the District Court had dismissed the claim for want of jurisdiction there was no consideration of or adjudication on the merits of the claim (*Baker* v. *Carr,* 369 US 186, 199, 7 L ed 2d 663, 675, 82 S Ct 691) which could operate as a bar to subsequent proceedings.

Even where, arguendo, the prior judgment is an adjudication on the merits of the present claim there is no bar to a subsequent suit when, between the time of the first decision and the second, there has been a controlling intervening decision on the points at issue contra the first holding. *State Farm Mut. Auto. Ins. Co.* v. *Duel,* 324 US 154, 89 L ed 812, 65 S Ct 573; 2 Freeman on Judgments (5th ed 1925) § 713; *Blair* v. *Commissioner,* 300 US 5, 9, 57 S Ct 330, 332, 81 L ed 465; *West Coast Life Ins. Co.,* v. *Merced Irr. Dist.,* (CA 9) 114 F2d 654, 662; *Murchard* v. *Berenson,* (CA 5) 307 F 2d 368.

The holding of *Byrne* v. *Kysar,* 347 F 2d 734 as to what constitutes State action "under color of law" was rendered in June, 1965. In March, 1966 this Court con-

strued and interpreted the phrase as used by Congress in the Civil Rights Acts (Title 42 USC § 1983) in its decision in *United States* v. *Price,* 383 US 787, 794, 16 L ed 2d 267, 272, 86 S Ct 1152 in the light of which the adequacy of complaint herein filed in July 1966 should have been determined although the Courts below refused to entertain any hearing or argument thereon.

Contrary to the holding in *Byrne* v. *Kysar,* 347 F2d 734, this Court has held in *United States* v. *Price,* that "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willing participant in joint activity with the State or its agents.' 'Under color' of law means the same thing of § 242 that it does in the civil counterpart to § 242, 42 USC § 1983 (1964 ed)," 383 US at 794, 16 L ed 2d at 272.

Nor is there any authority in *Byrne* v. *Kysar,* 347 F 2d 734, for the contention that judicial immunity from civil damage actions extends to persons acting without judicial jurisdiction in line with established precedents extending from *Bradley* v. *Fisher,* (US) 13 Wall 335, 20 L ed 646; *Thomas* v. *Hinsdale,* 78 Ill. 259 (1875); *Shadbolt* v. *Bronson,* 1. Mich 85 (1848); *Bieglow* v. *Stearns,* 19 Johns 39 (NY); (1820) to this Court's opinion last term in *Pierson* v. *Ray,* 386 US 547, 18 L ed 2d 288, 87 S Ct.

Or for the silly notion somewhere suggested, that lawyers are immune from liability, either before the Force Acts of 1866-1870; *Burnap* v. *Marsh,* 13 Ill. 536 (1852) or now, *Dombrowski* v. *Eastland,* 387 US 82, 18 L ed 2d 577, 87 S Ct 1425 (1967).

(b)

The record of a Federal District Court which does not speak the truth, and on its face shows that, speak-

ing falsely, it cannot import verity abrogates the traditional requirements of Federal courts for the preservation of the integrity of their records. *Evans* v. *Stettnisch,* 149 US 605, 37 L ed 866, 13 S Ct 931; *Chapman & D. Lumber Co* v. *Board of Directors St. Francis Levee Dist.,* 234 US 667, 58 L ed 1526, 34 S Ct 906; C.J.S., Courts, §§ 230, 237; Judgments, § 132; App & Err, § 1143; Am. Jur. 2d, Courts, §§ 26, 36; App & Err, §§ 486, 493.

A recital in the Court's judgment that "each and every defendant has moved to dismiss the complaint" and finding "each of the motions well taken" and ordering the complaint dismissed "as to each and every defendant named therein" (R 273) which is supported in the record only by a false affidavit of filing and service (R. 259, 260) and is controverted in the record by the clerk's docket entries and a contradictory affidavit of service (R. 257) defeats the otherwise invincible presumptions of the law that the Court acted impartially and honestly (*Crescent City L.S.L. & S.H. Co.* v. *Butcher's Union S.H. & L.S.L. Co.,* 120 US 141, 30 L ed 614, 7 S Ct 472), justly after due consideration (*Livingston* v. *Moore,* (US) 7 Pet 469, 8 L ed 751), for good reason and correctly (*Robinson* v. *Fair,* 128 US 53, 32 L ed 415, 9 S Ct 30), in conformity to law (*Shreveport* v. *Cole,* 129 US 36, 32 L ed 589, 9 S Ct 210), and in accordance with its duty (*Jennings* v. *Carson,* (US) 4 Cranch 2, 2 L ed 531); that the proceedings were regular (*Dallas County* v. *McKenzie,* 110 US 686, 28 L ed 285, 4 S Ct 184) in conformity with settled usage (*Williams* v. *United States,* (US) 1 How 290, 11 L ed 135) sufficient to support the judgment (*Florentine* v. *Barton,* (US) 2 Wall 210, 17 L ed 783) except where controverted by the record (*Ensminger* v. *Powers,* 108 US 292, 27 L ed 732, 2 S Ct 643). The integrity and value of the judi-

cial system as an institution for the administration of public and private justice rest largely upon this wholesome principle. Crescent City, etc., 120 US at 160.

If the punctilio of observance demanded in an earlier era has been eroded by contemporary standards, nonetheless court records still have a function to perform which has not been dispensed with (*Standard Vacuum Oil Co.* v. *United States,* 339 US 157, 160, 70 S Ct 545, 547, 94 L ed 731) and the plain words of a court's judgment roll is the only sentence recognized by the law. *Greene* v. *United States,* 358 US 326, 329, 3 L ed 2d 340, 342, 79 S Ct 340.

The duty of an attorney to the court and to assist in the administration of justice is not fulfilled by filing false and fraudulent affidavits of service (*Hertz* v. *United States,* (1927, CA 8) 18 F2d 52) which prejudice the rights of a party; and destroy the integrity of a court's record; and the conduct is subject to censure. *Temple* v. *United States,* cert. den. 386 US 961, 349 F2d 116 (1965), 18 L ed 2d 110.

## CONCLUSION

The State Court proceedings before the Courts below in this case sufficiently state a claim against the respondents, despite the inelegant draftsmanship of the complaint, to entitle petitioner to a fair and impartial hearing on the merits before a court adequately apprised of properly discovered relevant facts.

/s/ Paul V. Byrne, Jr.
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